

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERT J. LAWRENCE,	)	CASE NO. C06-1083-RSL-MAT
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	RE: SOCIAL SECURITY
MICHAEL J. ASTRUE, Commissioner	)	DISABILITY APPEAL
of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Robert J. Lawrence proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for further administrative proceedings.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1954.<sup>1</sup> He completed the tenth grade and later obtained a

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 General Equivalency Degree. Plaintiff previously worked as a janitor, kitchen worker, and  
02 packager. He spent a total of nearly twenty-two years in prison, incarcerated for various intervals  
03 between 1970 and 1993.

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05 Plaintiff protectively filed his SSI application on June 19, 2000. (AR 16, 759.) He alleged  
06 disability stemming from a traumatic brain injury he sustained as the victim of a beating while in  
07 prison in 1979, as well as a combination of other physical and mental impairments. His application  
08 was denied at the initial level and on reconsideration, and he timely requested a hearing. On April  
09 18, 2002, ALJ Arnold Battise held a hearing. (AR 586-628.) ALJ Battise issued a decision  
10 finding plaintiff not disabled on July 22, 2002. (AR 273-79.)  
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12 Plaintiff timely appealed. The Appeals Council granted review and entered an Order of  
13 Remand on January 31, 2003. (AR 280-82.) The Appeals Council found no evidence to support  
14 the ALJ's step four finding, no rationale to reject the opinions of Drs. Anselm Parlato and J.S.  
15 Stockburger or the limitations found in the state agency assessment, and an incomplete rationale  
16 in the evaluation of plaintiff's credibility. (AR 281.) The Appeals Council directed the ALJ to  
17 resolve whether plaintiff had any qualifying past relevant work, to give further consideration to  
18 the medical opinions of treating, examining, and non-examining sources, to re-evaluate plaintiff's  
19 credibility, and to reassess plaintiff at step four with the assistance of a vocational expert. (AR  
20 281-82.)  
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22 On October 21, 2002, plaintiff filed another SSI application, again alleging disability from  
23 the 1979 injury. (AR 318-21.) ALJ Battise considered this application concurrently with the  
24 remanded matter at a supplemental hearing held on December 12, 2003 (AR 629-90) and issued  
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official policy on privacy adopted by the Judicial Conference of the United States.

01 a second decision unfavorable to plaintiff on May 6, 2004 (AR 16-26).

02 Plaintiff timely appealed and the Appeals Council denied review. Plaintiff sought review  
03 in this Court, where the parties stipulated to a remand. The Court remanded the matter to a  
04 different ALJ, who was directed to obtain further evidence, to re-evaluate the record with specific  
05 attention to the results of plaintiff's mental evaluation, to re-evaluate plaintiff's credibility and lay  
06 witness testimony, and to make a new determination as to disability. (AR 706-07.) The Appeals  
07 Council also issued its own remand order, dated November 14, 2005. (AR 708-11.) It found that  
08 the ALJ's decision did not contain an adequate evaluation of the treating and examining  
09 physicians' opinions, plaintiff's credibility, or plaintiff's mental impairments. (AR 710-11.) The  
10 Appeals Council directed the ALJ to further consider the physicians' opinions, plaintiff's subjective  
11 complaints, plaintiff's mental impairments in accordance with 20 C.F.R. 416.920a, and third party  
12 statements/testimony. (AR 711.)

15 Plaintiff filed a third SSI application on August 3, 2004, alleging disability beginning in  
16 2000 and based on his head injury, Post-Traumatic Stress Disorder (PTSD), shoulder pain, and  
17 seizures. (AR 804-07.) The Commissioner consolidated all three claims and, on remand,  
18 assigned the case to ALJ Verrell Dethloff. ALJ Dethloff held a third hearing on March 28, 2006.  
19 (AR 720-55.) He took testimony from plaintiff, medical expert Arthur Lewy, Ph.D., and  
20 vocational expert (VE) Paul Tomita, M.Ed. ALJ Dethloff issued a decision unfavorable to plaintiff  
21 on May 26, 2006. (AR 759-69.) Given the previous court remand, ALJ Dethloff's May 2006  
22 decision stands as the final decision of the Commissioner. *See* 20 C.F.R. 416.1484 (a), (d)  
23 (following a remand by a federal court, where no exceptions are filed and the Appeals Council  
24 does not otherwise assume jurisdiction of the case, the decision of the ALJ becomes the final  
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01 decision of the Commissioner). Plaintiff once again seeks judicial review.

02 **JURISDICTION**

03 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

04 **DISCUSSION**

05 The Commissioner follows a five-step sequential evaluation process for determining  
06 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
07 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
08 engaged in substantial gainful activity since his alleged onset date. At step two, it must be  
09 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's  
10 status post closed head injury with residual left-side weakness, bilateral shoulder tendonitis,  
11 cognitive disorder, and PTSD severe. Step three asks whether a claimant's impairments meet  
12 or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal  
13 the criteria for any listed impairment. If a claimant's impairments do not meet or equal a listing,  
14 the Commissioner must assess residual functional capacity (RFC) and determine at step four  
15 whether the claimant has demonstrated an inability to perform past relevant work. The ALJ  
16 found plaintiff capable of medium-level exertional activities, compromised by some non-  
17 exertional limitations, and concluded he could perform his past relevant work as a janitor. If a  
18 claimant demonstrates an inability to perform past relevant work, the burden shifts to the  
19 Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
20 adjustment to work that exists in significant levels in the national economy. Finding plaintiff not  
21 disabled at step four, the ALJ did not proceed to step five.

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This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that ALJ Dethloff erred in assessing various physicians' opinions and in assessing different conditions diagnosed by those physicians at steps two and three. Plaintiff also asserts error in the ALJ's credibility and RFC assessments, in failing to address lay witness testimony, and in his assessment of plaintiff's past relevant work at step four, including his reliance on the VE's testimony. He seeks remand for an award of benefits or, alternatively, for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence, that any errors were harmless, and that the decision should be affirmed. For the reasons described below, the undersigned concludes that this matter should be remanded for further administrative proceedings.

#### Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-

01 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not  
02 contradicted by another physician, a treating or examining physician's opinion may be rejected  
03 only for "'clear and convincing'" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396  
04 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be  
05 rejected without "'specific and legitimate reasons' supported by substantial evidence in the  
06 record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
07 1983)). Where the opinion of the treating physician is contradicted, and the non-treating  
08 physician's opinion is based on independent clinical findings that differ from those of the treating  
09 physician, the opinion of the non-treating physician may itself constitute substantial evidence.  
10 *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ  
11 to resolve this conflict. *Id.*

14 "Where the Commissioner fails to provide adequate reasons for rejecting the opinion of  
15 a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*,  
16 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true,  
17 plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.  
18 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,  
19 the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec.*  
20 *Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given  
21 the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's]  
22 functional limitations is sufficient to meet or equal [a listing.]"); *Smolen v. Chater*, 80 F.3d 1273,  
23 1292 (9th Cir. 1996) (ALJ's reasoning for rejecting subjective symptom testimony, physicians'  
24 opinions, and lay testimony legally insufficient; finding record fully developed and disability finding  
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01 clearly required).

02       However, courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*  
03 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there  
04 were insufficient findings as to whether plaintiff’s testimony should be credited as true). As stated  
05 by one district court: “In some cases, automatic reversal would bestow a benefits windfall upon  
06 an undeserving, able claimant.” *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp.  
07 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith  
08 error, in that some of his stated reasons for rejecting a physician’s opinion were legally  
09 insufficient).

11       Plaintiff argues that, in this case, the ALJ failed to consider all of the medical evidence,  
12 failed to correct the previous ALJ’s errors, and erred in disregarding and/or rejecting medical  
13 opinions by relying on the rationale provided in the previous ALJ’s decisions. The relevant  
14 portions of the remand orders and ALJ Dethloff’s discussion of those orders are excerpted below.

15       In its 2003 remand order, the Appeals Council found as follows:

16       The decision lacks rationale to reject the opinion of the treating and/or examining  
17 physician, A. Parlatore, M.D., for mental limitations . . . . There is also no rationale  
18 to reject the postural and manipulative limitations to the full range of light work in the  
19 state agency assessment or limitation to sedentary work given by Dr. Stockburger.

20       (AR 281 (internal citations to record omitted.)) The 2005 Appeals Council remand order stated  
21 in relevant part:

22       The hearing decision does not contain an adequate evaluation of the treating and  
23 examining source opinions in the record. The medical opinions from Dr. Parlatore  
24 reflect multiple diagnoses without accompanying treatment records to support the  
25 changes of opinion. Dr. Pham noted a left sided paresthesia and weakness with PTSD  
26 and other musculoskeletal complaints and found the claimant capable of light work  
with the restriction of occasional lifting. Dr. Alan G. Fitz performed a

01 neuropsychological exam on September 15, 2003 and found that he demonstrated at  
02 least average cognitive abilities for most areas assessed, including attention,  
03 concentration, visual scanning, processing speed, verbal and visual memory. Dr. Fitz  
04 diagnosed a mild cognitive disorder (NOS); major depressive disorder, mild and  
05 recurrent; post-traumatic stress disorder; and polysubstance dependence in remission  
06 and a [Global Assessment of Functioning (GAF)] of 50. Dr. Kathleen S. Mayers had  
07 seen the claimant on October 5, 2000 and found him to be capable of employment.  
08 Diagnoses made were of PTSD; polysubstance dependence; seizure disorder and a  
09 GAF of 61. Judgment, reasoning, common sense, memory skills, and social skills  
10 were all good. These findings are inconsistent with the reports from Dr. Parlatore and  
11 with the claimant's allegations. Further consideration of the examining and  
12 nonexamining opinions is needed prior to reaching a conclusion in this case.

09 (AR 710 (internal citations to record omitted.)) ALJ Dethloff subsequently responded to the  
10 remand order in stating:

11 The earlier decisions fully and adequately discussed the examinations by Dr. Pham,  
12 Dr. Parlatore, Dr. Fitz, and Dr. Mayers and, as the Appeals Council succinctly put it,  
13 a number of findings were inconsistent with the reports by Dr. Parlatore. The earlier  
14 decisions explored and explained these issues, as well as Dr. Parlatore's internal  
15 inconsistencies, lack of clinical support, and lack of knowledge. Those factors are  
16 reasonable in assessing medical opinions.

15 For example, Dr. Parlatore reported that the claimant had substance abuse problems,  
16 an antisocial disorder, and a seizure disorder with a number of marked and severe  
17 limitations. But those assessments were prepared on check-box forms without any  
18 reference to clinical findings for their support, and Dr. Parlatore's assessments were  
19 internally inconsistent with respect to diagnosis or limitations. Dr. Parlatore admitted  
20 that he never treated the claimant and only saw him briefly once a year for DSHS  
21 review, a factor suggesting very little support for his opinions. At Dr. Parlatore's  
22 examinations the claimant had intact mental status functioning, inconsistent with  
23 significant limitations.

21 Turning to other issues raised by the Appeals Council, the prior decision indicated  
22 that the claimant may have diagnoses of PTSD, depression and substance abuse, but  
23 the limitations imposed by these conditions are not as significant as alleged. Special  
24 attention was paid to the reports of Dr. Parlatore, and pointed out the inconsistencies  
25 and lack of credibility in his opinions, both internally and with the assessments and  
26 findings by other medical sources. Some of these inconsistencies are discussed above.  
Allan Fitz, Ph.D., performed a neuropsychological evaluation of the claimant, which  
noted only mild limitations at most; in general the claimant's functioning was average  
or better, contradicting Dr. Parlatore (who did not perform clinical testing) and also

01 contradicting Dr. Fitz' own conclusion that the claimant had marked social limitations  
02 interacting with supervisors. Otherwise, Dr. Fitz' report, based on objective testing,  
03 is given a fair amount of weight.

04 (AR 763-64 (internal citations to record omitted.)) ALJ Dethloff thereafter assessed the medical  
05 information submitted following remand. Where pertinent to an argument raised by plaintiff, that  
06 assessment is discussed below.

07 A. Dr. Anselm Parlatore

08 In further considering Dr. Parlatore's opinions, ALJ Dethloff found as follows:

09 Dr. Parlatore examined the claimant again in May 2005, and the claimant regurgitated  
10 his past injuries and residual mental and physical problems. Dr. Parlatore diagnosed  
11 PTSD, depressive disorder NOS, cognitive disorder per history, and a GAF of 40.  
12 He thought that the claimant had significant, symptomatic PTSD and cognitive  
13 deficits; although the GAF level is consistent with disability, Dr. Parlatore did not  
14 assess any limitations. He did not support his opinion in any fashion, other than  
15 noting that the claimant seemed downcast and depressed. Dr. Parlatore accepted the  
16 claimant's reported history at face value, apparently, but the claimant's mental status  
17 examination was intact within normal limits and Dr. Parlatore found no gross  
18 cognitive deficit.

19 This assessment is very typical for Dr. Parlatore, and suffers from the same  
20 inadequacies that were discussed with respect to his opinions heretofore: lack of  
21 objective clinical findings, consistency with intact mental status functioning, and naive  
22 acceptance of complaints at face value. Overall, Dr. Parlatore's opinions are  
23 extravagant in nature and supported with very little clinical evidence, an [stet]  
24 contradicted by other medical opinions and observations.

25 One example is Dr. Parlatore's gratuitous observation that the claimant had  
26 "considerable deformity in his fingers, and thumbs, and considerable pain and  
dysfunction with his digits". That observation is completely contradicted by physical  
examinations that have reported no difficulty with the claimant's hands other than  
thumb pain following an actual injury. Dr. Parlatore seems to have advocated for the  
claimant, which raises the question about his medical performance.

Dr. Parlatore's earlier check-box assessment of February 1, 2002, is a case in point.  
There, he found marked limitations in all areas of functioning, consistent with a listing.  
He based that assessment on his "examination of October 13, 2001." But a look at  
that examination report shows that he found only moderate limitations, without any

01 review of clinical or mental status findings. Further, the claimant's other clinical  
02 examinations and testing did not reveal any significant problem with cognition, social  
03 functioning, or daily activities.

04 A medical expert, Arthur Lewy, Ph.D., reviewed the record and attended the  
05 claimant's testimony at the most recent hearing. He commented on Dr. Fritz' report  
06 that found marked difficulties. Dr. Lewy concluded that this report showed the lack  
07 of consistency between the claimant's self-reports as opposed to other findings. He  
08 was uncertain as to how this could be resolved, but he noted that despite the  
09 claimant's plethora of symptoms he had excellent mental control and persistence.  
10 Some symptoms were reported in the record, but they were not "marked." The  
11 claimant's reported difficulty getting along with others was not described in the  
12 medical records. That testimony is reasonable, because although the claimant has  
13 referred to interpersonal problems, he presented as socially competent, even at Dr.  
14 Parlatore's examinations.

15 Dr. Lewy opined that one could suspect an anti-social personality disorder, but the  
16 evidence did not support this with "major rule violations" (he has a past history of  
17 prison time for felony offenses, however). He might have some narcissistic  
18 personality traits; this was shown by his over-reporting of problems. Otherwise, the  
19 claimant had restricted mood and signs of depression, but the Beck Inventory was  
20 only mild. That is consistent with the evidence of record. Dr. Lewy said that there  
21 were times when the claimant had mood "problems" but there was no support for his  
22 alleged symptoms with respect to objective findings. The claimant had a cognitive  
23 disorder with some thinking disturbance, and mood problems.

24 Turning to Dr. Parlatore's reports, Dr. Lewy said that there was no true evidence of  
25 a head injury; the neuropsychological report suggesting there could possibly be an  
26 earlier head injury, or substance abuse. Dr. Phan did not observe any strength  
differential as reported. Those reports support a finding that the claimant has a  
cognitive disorder of some type, possibly from a head injury at one time, but without  
any significant residuals.

Dr. Lewy determined that the claimant had a cognitive disorder and PTSD, with  
perceptual thinking disturbances. The claimant had discussed mood disturbance but  
that was not documented in the file. Dr. Lewy opined that the claimant had mild  
difficulty with daily living activities and moderate limitations in social functioning,  
concentration, persistence, and pace. There were no episodes of decompensation.  
The claimant's condition did not meet the "B" or "C" criteria of any listing. This  
assessment is consistent with the clinical neurological test findings and other credible  
medical examinations as discussed in the earlier decisions and above, and his  
statements are given substantial weight.

01 In light of this testimony I have not made a special effort to recontact Dr. Parlatore.  
02 And see my discussion supra. Dr. Parlatore is not a treating source. Moreover, it is  
03 the inadequacy of the record, rather than the rejection of the treating physician's  
04 opinion, that triggers the duty to recontact that physician. See, 20 CFR 416.912(e);  
05 416.919a(b); Bayliss v. Commissioner, Social Security Administration, 427 F.3d 1211  
06 (9 Cir. 2005); Thomas v. Barnhart, 278 F.3d 947 (9 Cir. 2002); White v. Massanari,  
07 271 F.3d 1256 (10 Cir. 2001) (Citation omitted). See, Mayes v. Massanari, 276 F.3d  
08 453, 459-60 (9 Cir. 2001 ("An ALJ's duty to develop the record further is triggered  
09 only when there is ambiguous evidence or when the record is inadequate to allow for  
proper evaluation of the evidence."). See Brown v. Heckler, 713 F.2d 441, 443 (9  
Cir. 1983). The record in this case contains many medical records and other  
information which provide ample basis for an informed determination on the merits  
of claimant's allegations that he is disabled. See, Strongson v. Barnhart, 361 F.3d  
1066, 1072 (8th Cir. 2004).

10 (AR 765-67 (internal citations to record omitted.))

11 Plaintiff asserts that ALJ Dethloff erroneously relied on rationale supplied by ALJ Battise,  
12 which was twice rejected by the Appeals Council. However, ALJ Dethloff's consideration of ALJ  
13 Battise's decision appears perfectly consistent with the Appeals Council's remand order – which  
14 found various findings in the record inconsistent with the reports from Dr. Parlatore and plaintiff's  
15 allegations. Also, as reflected above, while the ALJ did discuss and agree with the conclusions  
16 of ALJ Battise, he further considered the opinions of Dr. Parlatore in detail.

18 Plaintiff maintains that the additional reasoning provided by ALJ Dethloff is merely a  
19 regurgitation of ALJ Battise's rationale. Yet, plaintiff focuses almost entirely on ALJ Dethloff's  
20 initial discussion of Dr. Parlatore and the previous ALJ's decisions, rather than ALJ Dethloff's  
21 extensive subsequent discussion of Dr. Parlatore's opinions. Plaintiff's assertion that this  
22 discussion was simply a regurgitation of the rationale provided by ALJ Battise is not supported  
23 by a review of the decisions. (*Compare* AR 19-22, *with* AR 765-67.)

25 Plaintiff also argues that Dr. Parlatore's opinions were consistent with the opinions of  
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01 other physicians in the record. He asserts that, in assessing some of these opinions, ALJ Dethloff  
02 misstates the record. However, if anything, it is plaintiff who misstates the ALJ's findings. For  
03 example, plaintiff objects to the ALJ's statement that Dr. Allan Fitz found only mild limitations,  
04 with average or better functioning. Plaintiff notes that these findings related solely to cognitive  
05 functioning, and that Dr. Fitz assessed numerous moderate and marked limitations on his medical  
06 source statement and found plaintiff's "prognosis for increasing his independence and for  
07 employment . . . moderately to markedly reduced given the combination of his emotional and  
08 cognitive issues." (AR 557, 559-60.) Yet, the ALJ was clearly describing the results of Dr. Fitz's  
09 neuropsychological evaluation and reasonably concluded that those results contradicted at least  
10 one of Dr. Fitz's conclusions on his medical source statement. (*See* AR 556-57, 764.) Plaintiff  
11 also asserts error in the ALJ's statement that Dr. Tedd Judd "did not report any clinical  
12 testing"(AR 765), pointing to a variety of Dr. Judd's findings (*see* AR 232-42). However, ALJ  
13 Dethloff related this statement only to Dr. Judd's finding with respect to plaintiff's ability to  
14 tolerate work stress, not to his examination as a whole. (*See* AR 765 ("However, the issue of  
15 stress management is an uncertainty because it was largely based on the claimant's subjective  
16 comments; certainly, Dr. Judd did not report any clinical testing; he may have relied on Dr. Fitz'  
17 assertion of marked difficulty with stress, but Dr. Fitz only speculated about that based on the  
18 claimant's past prison history[.]") (internal citation to record omitted.)) Plaintiff also points to Dr.  
19 William Coleman's opinions and complains that, while the ALJ purported to give them "some  
20 weight" (AR 764), he failed to include moderate to marked limitations assessed by Dr. Coleman  
21 in the RFC assessment. However, plaintiff fails to support the inference that, simply because the  
22 ALJ gave some weight to an assessment from a physician, he was required to adopt all of the  
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01 limitations that physician assessed.

02 Nor do plaintiff's remaining arguments demonstrate error. For example, the ALJ did not  
03 rely solely on the opinions of non-examining physicians – either Dr. Kathleen Mayer or medical  
04 expert Dr. Arthur Lewy – in rejecting the opinions of Dr. Parlatore. Indeed, he only mentioned  
05 Dr. Mayer in relation to the previous ALJ's assessment, and, while he did afford substantial weight  
06 to the opinions of Dr. Lewy, he provided a number of other reasons for rejecting the opinions of  
07 Dr. Parlatore. (*See* AR 763-67.)<sup>2</sup>

09 In sum, plaintiff does not demonstrate that the ALJ's assessment of Dr. Parlatore was  
10 insufficient or that his opinions should be credited as true. Instead, ALJ Dethloff provided specific  
11 and legitimate reasons supported by substantial evidence in his critique of the opinions of Dr.  
12 Parlatore.  
13

14 B. Dr. Tedd Judd

15 Plaintiff also raises a separate argument with respect to Dr. Judd, asserting ALJ Dethloff  
16 improperly rejected Dr. Judd's 2000 finding that plaintiff "has a disabling PTSD with depression  
17 and anxiety." (AR 242.) He argues that this opinion should be credited as true.  
18

19 However, plaintiff selectively quotes Dr. Judd's finding. In 2000, Dr. Judd found as  
20 follows:

21 In this screening neuropsychological testing Mr. Lawrence does not appear to be  
22 cognitively impaired to the point that he could qualify for disability. However, he  
23 clearly has a significant disability in his left hemiparesis. Although this evaluation was  
24 primarily neuropsychological in nature and did not pursue emotional and personality

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25 <sup>2</sup> Plaintiff also argues that the ALJ failed to give legitimate reasons for rejecting Dr.  
26 Parlatore's assessment of seizure disorder related to his head trauma, a diagnosis also reached by  
Dr. Mayer. However, ALJ Dethloff noted, in considering the opinions of Dr. Parlatore, the lack  
of clinical findings to support the diagnosed seizure disorder. (AR 764.)

01 issues in detail, it also appears that Mr. Lawrence has disabling PTSD with depression  
02 and anxiety. His physician may be able to complete a disability evaluation for him  
03 based on these problems.

04 (*Id.*) Therefore, Dr. Judd indicated that he did not focus on plaintiff's PTSD, depression, or  
05 anxiety and, although speculating as to the severity of these conditions, he deferred a finding to  
06 plaintiff's treating physician. Dr. Judd also assessed a GAF of 55 in 2000, meaning moderate  
07 symptoms or moderate difficulty in social, occupational, or school functioning.

08 Moreover, ALJ Dethloff focused on Dr. Judd's January 2005 records in his decision. (*See*  
09 AR 765 (discussing records at AR 896-99, 910.)) Plaintiff fails to demonstrate any reversible error  
10 in the ALJ's assessment of those records. As with the opinions of Dr. Coleman, although ALJ  
11 Dethloff gave the 2005 assessments of Dr. Judd "a fair degree of weight[]" (AR 765), he was not  
12 required to adopt all of the limitations assessed by this physician.  
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14 C. Drs. Allan Fitz and William Coleman

15 Plaintiff similarly raises separate arguments as to Drs. Fitz and Coleman. He maintains that  
16 ALJ Dethloff failed to provide specific and legitimate reasons for rejecting Dr. Fitz's diagnoses  
17 of major depression and likely personality disorder, and Dr. Coleman's diagnosis of personality  
18 disorder. He asserts that this also demonstrates error at steps two and three. *See Smolen*, 80 F.3d  
19 at 1290 ("An impairment or combination of impairments can be found 'not severe' only if the  
20 evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's  
21 ability to work.'") (quoting Social Security Ruling (SSR) 85-28); and 20 C.F.R. Part 404, Subpart  
22 P, App. 1 (containing "Listing of Impairments" an ALJ must consider in determining whether  
23 a claimant's impairments meet or equal one of the listed impairments at step three).  
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26 The Commissioner describes Dr. Fitz as equivocal on plaintiff's ability to work and Dr.

01 Coleman as reporting in a less desirable check-box format. However, without further elaboration,  
02 he concedes error with respect to one or both of these physicians.<sup>3</sup> Therefore, while it is not  
03 clear, the Commissioner may concede error in the ALJ's failure to specifically address the  
04 diagnoses of major depression and personality disorder at steps two and beyond.  
05

06 ALJ Dethloff noted generally at step two that "[o]ther symptoms and conditions appear  
07 in the record from time to time," but found them "no more than transient and [not causing]  
08 significant limitations." (AR 762.) Also, he gave substantial weight to the opinions of medical  
09 expert Dr. Lewy, who found that the evidence did not support an anti-social personality disorder  
10 and who acknowledged signs of depression, but noted that "the Beck Inventory was only mild[]"  
11 and that mood disturbance was not documented in the file. (AR 766-67.) He gave "a fair amount  
12 of weight" to Dr. Fitz's opinions and "some weight" to the opinions of Dr. Coleman. (AR 764.)  
13

14 Because the Commissioner concedes error and because this case already warrants remand  
15 for the reasons described below, the undersigned concludes that the ALJ should directly address  
16 the diagnoses of major depression and personality disorder on remand. However, the opinions of  
17 Drs. Fitz and Coleman should not be credited as true. Plaintiff focuses largely on diagnoses made  
18 by these physicians. However, "[t]he mere diagnosis of an impairment listed in Appendix 1 is not  
19 sufficient to sustain a finding of disability. . . . [An impairment] must also have the *findings* shown  
20 in the Listing of that impairment." *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985)  
21 (emphasis in original). Plaintiff does not demonstrate that he has met his burden of proving the  
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24 <sup>3</sup> It is not clear whether the Commissioner concedes error with respect to one or both of  
25 these physicians in that he states: "Dr. Fitz was equivocal as to Plaintiff's ability to work, and  
26 Dr. Coleman's opinions appear to be in the less-preferred format of a check-box form.  
Nevertheless, the Commissioner concedes that the ALJ erred in his review of *this* doctor's  
opinion." (Dkt. 23 at 4-5 (emphasis added; internal citation to record and cited source omitted.))

01 existence of impairments meeting or equaling a listing. *See Burch v. Barnhart*, 400 F.3d 676,  
02 683 (9th Cir. 2005). (*See also, e.g.*, AR 910 (Dr. Judd, in January 2005, opined: “I do not see him  
03 as having a major depression at present[.]”))

04 D. Dr. J.S. Stockburger

05 Plaintiff argues that ALJ Dethloff failed to consider the findings and opinions of treating  
06 physician Dr. Stockburger. He again asserts associated step two and three errors, pointing to  
07 evidence from Dr. Stockburger as to a hand impairment with numbness and pain, as well as  
08 chronic headaches. (*See, e.g.*, AR 193-94, 199, 206, 376, 438-39, 476.)<sup>4</sup> He also notes Dr.  
09 Stockburger’s 2002 opinion that plaintiff would be unable to work full time because of his  
10 “psychological problems[.]” noting he “may be permanently disabled” and that “this would  
11 probably be a disability due to psychiatric and/or neurological problems related to his head injury  
12 and PTSD.” (AR 476.)

13 The Commissioner acknowledges that Dr. Stockburger found plaintiff more limited than  
14 did the ALJ, including, in 2000, finding plaintiff limited to sedentary work. (*See* AR 194.)  
15 However, the Commissioner points to contrary evidence, including the recent opinion of  
16 examining physician Dr. John Leshner, who found plaintiff could lift and carry 25-50 pounds, and  
17 had no postural or manipulative limitations, nor any relevant visual, communicative, or workplace  
18 limitations. (*See* AR 895.) He asserts that the ALJ appropriately exercised his duty to resolve the  
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24 <sup>4</sup> Plaintiff also points to a report from examining physician Dr. Fred Darvill in November  
25 2000 as supporting his hand limitations. (*See* AR 188.) However, while Dr. Darvill found  
26 “limited coin transfer from the left hand to the right hand [and] [d]ecreased sensation in the left  
hand[.]” he also noted that plaintiff’s “right hand is normal for grasping and manipulating and  
fine and dextrous movement[.]” and found plaintiff to be “quite capable of performing work  
related activities and motivated to do so.” (AR 188-89.)

01 ambiguities in the medical record.

02 ALJ Dethloff does not mention Dr. Stockburger in his decision. However, he does  
03 incorporate the assessment in ALJ Battise's previous decisions. (*See* AR 763.) As noted above,  
04 the Appeals Council directed ALJ Battise to consider the opinions of Dr. Stockburger on remand,  
05 noting the absence of any rationale to reject the limitation to sedentary work assessed by this  
06 physician in 2000. (AR 281.) On remand, ALJ Battise assessed Dr. Stockburger's opinions as  
07 follows:  
08

09 In November 2002, Dr. Stockburger examined the claimant. He reported that the  
10 claimant's residual head injury, PTSD, shoulder dislocations, and hepatitis C  
11 combined to limit him to light work, with additional restrictions imposed by a reduced  
12 gait, normal strength, normal range of motion but with less-than-optimal shoulder  
13 flexibility, and only slightly decreased strength and fine motor skills on the left and  
14 right upper extremities. Those findings suggest that the claimant does not have  
15 significant physical restrictions.

14 . . .

15 Dr. Stockburger added that the claimant might be disabled, but that would be due to  
16 psychiatric issues; the claimant would be able to work with his physical restrictions.  
17 That report is considered, but Dr. Stockburger did not elaborate on that general  
18 comment, and the credible psychiatric reports do not suggest any disabling mental  
19 impairment.

19 (AR 21 (internal citations to record omitted.))

20 Plaintiff fails to demonstrate error with respect to Dr. Stockburger. While the 2005  
21 remand order from the Appeals Council did reflect the need for further consideration of  
22 physicians' opinions, Dr. Stockburger was not among the several different physicians specifically  
23 mentioned. (*See* AR 710.) ALJ Battise's assessment of Dr. Stockburger's opinions was sufficient.  
24 Furthermore, in addition to incorporating this assessment, ALJ Dethloff relied on contrary  
25 evidence, including the opinions of Dr. Leshner and state Disability Determination Service (DDS)  
26

01 reviewers as to plaintiff's physical issues, and the opinions of Dr. Lewy and other DDS reviewers  
02 as to plaintiff's non-physical issues. (AR 765-68.) Additionally, while the ALJ did not mention  
03 a hand impairment or chronic headaches at step two, he generally found other symptoms  
04 mentioned in the record "no more than transient" or not causing significant limitations. (AR 762.)  
05 He also later concluded that the "medical reports do not support a finding that [plaintiff] cannot  
06 use his hands." (AR 768.) As such, plaintiff also fails to demonstrate error with respect to these  
07 conditions at step two and beyond.  
08

09 E. Dr. Phan

10 Plaintiff asserts that, in the 2005 remand order, the Appeals Council mentioned Dr. Pham  
11 because ALJ Battise ignored this physician's findings of left sided paresthesia and weakness which  
12 would limit plaintiff in the performance of a full range of light work. (*See* AR 710.) He adds that  
13 Dr. Pham found limitations in pushing and pulling in his upper extremities and in reaching in all  
14 directions, finding he could do the latter only occasionally. (*See* AR 381-82.)  
15

16 Plaintiff misconstrues the Appeals Council's mention of Dr. Pham. The Appeals Council  
17 stated: "Dr. Pham noted a left sided paresthesia and weakness with PTSD and other  
18 musculoskeletal complaints and found the claimant capable of light work with the restriction of  
19 occasional lifting." (AR 710 (internal citation to record omitted.)) Yet, the Appeals Council cited  
20 these findings, as well as those from other physicians, as "inconsistent with the reports from Dr.  
21 Parlatore and with the claimant's allegations." (*Id.*) ALJ Dethloff recognized the distinction made  
22 by the Appeals Council and found that the earlier decisions "fully and adequately discussed" the  
23 records from Dr. Pham. (AR 763.) (*See also* AR 20 (ALJ Battise gave Dr. Pham's report "a fair  
24 degree of weight" in that "it suggests that the claimant could perform a broad range of light  
25  
26

work.”)) Plaintiff fails to demonstrate that the ALJ erred in adopting ALJ Battise’s assessment. However, Dr. Pham’s findings as to limitations in pushing, pulling, and reaching are further addressed below.

#### Credibility and RFC Assessments

Plaintiff challenges the ALJ’s credibility and RFC assessments. Because the arguments blend into each other, they are addressed together below.

In its 2005 remand order, the Appeals Council found ALJ Battise’s 2004 credibility decision deficient, stating:

The hearing decision indicates . . . that the claimant’s subjective complaints are not credible but does not address whether the claimant has an underlying medically determinable physical or mental impairment that could reasonably be expected to produce the symptoms alleged and does not consider the following factors in evaluating the intensity, persistence and limiting effects of the alleged symptoms: medical opinions; prior work record; daily activities; the location, duration, frequency and intensity of pain or other symptoms; precipitating and aggravating factors; the type, dosage, effectiveness and side effects of medication; treatment other than medication and other measures used to relieve symptoms.

(AR 711.)

On remand, ALJ Dethloff found that while “the claimant’s medically determinable impairments could reasonably be expected to produce some symptoms,” his “statements concerning the intensity, duration and limiting effects of his symptoms are not entirely credible.”

(AR 763.) He subsequently incorporated the review and analysis of evidence in the prior decisions, discussed the issues raised by the Appeals Council, and reviewed additional medical evidence, before elaborating on his credibility finding as follows:

As shown in the earlier decisions, there are concerns about the claimant’s credibility, which are further found in this decision. The claimant’s medical reports do not support a finding that he cannot use his hands, he has no seizures, he is cognitively intact, he has normal gait, and substantial capacity to lift and carry objects. He may

01 be grumpy at times, but he is able to interact with others.

02 These reports suggest that the claimant has some limitations in functioning, but not  
03 to the point of disability. Other evidence also supports that conclusion.

04 The claimant said that he tried to exercise by walking, and spends time praying,  
05 reading, doing beadwork, and that he helped watch his sister's children from time  
06 to time. These reports show that he is indeed able to concentrate, move about, and  
take social responsibility.

07 The claimant said that he had spent many years in prison for felony convictions. He  
08 said that he continued to use marijuana on occasion. These factors tend to impugn  
09 his credibility, although he does not have any evidence of continued substance abuse  
or continued significant anti-social behavior.

10 The undersigned finds the claimant to be less than fully credible for reasons which  
11 include: (1) the claimant's manner and demeanor fail to convincingly convey  
12 credibility; (2) the lack of objective findings substantiating his alleged symptoms and  
13 limitations; (3) claimant's ability to perform physical activities; (4) the results of  
14 subjective testing within normal limits; (5) the claimant's continued range of daily  
activities and social functioning with family and friends; (6) the claimant's  
complaints of increased symptoms despite normal objective testing; and (7) other  
factors discussed in this decision.

15 (AR 768.)

16 In assessing his RFC, the ALJ found plaintiff capable of performing up to medium work,  
17 including lifting no more than fifty pounds at a time, with frequent lifting of up to twenty-five  
18 pounds. (AR 762-63.) The ALJ added: "He can frequently reach and push/pull with his arms and  
19 occasionally crouch, crawl, bend, and stoop. He can perform simple, repetitive work activity that  
20 do [stet] not involve working with the public or close interaction with co-workers." (AR 763  
21 (emphasis removed.))

23 Plaintiff argues that the ALJ erred in rejecting his testimony as to his reaching limitations,  
24 hand limitations, numbness, and pain, and failed to comply with the Appeals Council's directive.  
25 He further notes that, although acknowledging that his "reported shoulder impairment has  
26

01 continued, with some limitations with reaching, pushing, and pulling[.]” ALJ Dethloff found he  
02 could “frequently reach and push/pull with his arms[.]” (AR 763-64.) He points to medical  
03 evidence supporting limitations in his ability to reach, push, and pull. (*See, e.g.*, AR 382 (Dr.  
04 Pham found plaintiff limited in pushing and pulling in his upper extremities and in reaching in all  
05 directions, and capable of only occasional reaching) and AR 209 (reviewing physician Dr. Hoskins  
06 found plaintiff limited in reaching in all directions and stated: “Due to shoulder problems overhead  
07 work is precluded. He has some decreased sensation in the left hand, so this is limited to  
08 occasional use when fine sensation is required. Gross and fine manipulation is OK.”))

09  
10 Plaintiff also maintains that the ALJ improperly based the conclusion that he could perform  
11 medium exertional work solely on the opinion of examining physician Dr. Leshner. Additionally,  
12 he notes that the ALJ failed to include a limitation on interacting with supervisors, a limitation  
13 identified by multiple doctors. (*See* AR 898 (Dr. Judd assessed a moderate degree of difficulty  
14 in interacting appropriately to coworkers and supervisors), AR 921-22 (DDS reviewer found  
15 plaintiff moderately limited in ability to accept instructions and respond appropriately to criticism  
16 from supervisors and noted “history of ‘impulsive’ behavior limits him to working where  
17 supervision can be structured.”))

18  
19 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
20 reject a claimant’s testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*  
21 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant’s testimony unreliable,  
22 an ALJ must render a credibility determination with sufficiently specific findings, supported by  
23 substantial evidence. “General findings are insufficient; rather, the ALJ must identify what  
24 testimony is not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81  
25  
26

01 F.3d at 834. “We require the ALJ to build an accurate and logical bridge from the evidence to  
02 her conclusions so that we may afford the claimant meaningful review of the SSA’s ultimate  
03 findings.” *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). “In weighing a claimant’s  
04 credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his  
05 testimony or between his testimony and his conduct, his daily activities, his work record, and  
06 testimony from physicians and third parties concerning the nature, severity, and effect of the  
07 symptoms of which he complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.  
08 1997).

10 In this case, the ALJ provided clear and convincing reasons for rejecting plaintiff’s  
11 testimony and complied with the Appeals Council’s directive. Although he did not address each  
12 and every factor identified by the Appeals Council – such as issues associated with plaintiff’s  
13 medication – on the whole, his assessment was sufficient. However, on remand for other reasons,  
14 the ALJ’s credibility assessment may be implicated and should be reassessed. Also, as discussed  
15 below, the Court finds the ALJ’s RFC assessment problematic.

17 RFC is the most a claimant can do considering his or her limitations or restrictions. *See*  
18 SSR 96-8p. Although acknowledging that plaintiff’s shoulder impairment has “continued, with  
19 some limitations with reaching, pushing, and pulling[,]” ALJ Dethloff included no such limitations  
20 in his RFC assessment, instead finding plaintiff capable of “frequently” reaching, pushing, and  
21 pulling with his arms. (AR 764.) This inconsistency should be addressed on remand. This issue  
22 also implicates the ALJ’s decision as to plaintiff’s past relevant work given that, as discussed  
23 below, with the inclusion of a limitation to “occasional” reaching, the VE testified that plaintiff  
24 could not perform his past relevant work as a janitor or custodian. (AR 749, 752-53.) The ALJ  
25  
26

01 should also take the opportunity on remand to clarify whether plaintiff's RFC assessment should  
02 include a limitation on working with supervisors.

03 Lay Witness Testimony

04 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability  
05 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).  
06 The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each  
07 witness. *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members  
08 because, *inter alia*, they were "'understandably advocates, and biased'" amounted to "wholesale  
09 dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a  
10 reason germane to each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918  
11 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony  
12 as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless  
13 he or she expressly determines to disregard such testimony and gives reasons germane to each  
14 witness for doing so.") Moreover, as recently found by the Ninth Circuit: "[W]here the ALJ's  
15 error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a  
16 reviewing court cannot consider the error harmless unless it can confidently conclude that no  
17 reasonable ALJ, when fully crediting the testimony, could have reached a different disability  
18 determination." *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).  
19  
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22

23 Both this Court and the Appeals Council directed the ALJ to reevaluate lay witness  
24 testimony in the record on remand. (*See* AR 706 (directing ALJ to "re-evaluate . . . the lay  
25 witness testimony") and AR 711 (directing ALJ to: "Consider the third party statements/testimony  
26

01 and provide rationale for the weight given to such evidence in accordance with *Dodrill v.*  
02 *Shalala*.”)) However, ALJ Dethloff failed to even mention the lay witness statements from  
03 plaintiff’s brother and mother.<sup>5</sup> He did state that “[t]he evidence submitted with respect to the  
04 earlier hearings was discussed in the prior decisions[,]” and that “[t]hat review and analysis [was]  
05 incorporated” into his decision. (AR 763.) This statement arguably could be construed as ALJ  
06 Dethloff accepting ALJ Battisse’s determination that reports from plaintiff’s brother and mother  
07 were “based on frequent contact with” plaintiff and were “given substantial weight.” (AR 23.)  
08 However, ALJ Dethloff was not specific as to what “evidence” he was referring to in making this  
09 statement. Moreover, even if he agreed with ALJ Battisse’s assessment, ALJ Dethloff clearly failed  
10 to follow the specific directive from this Court and the Appeals Council to reevaluate the lay  
11 witness testimony.  
12

13  
14 This error requires remand for further administrative proceedings. As found by ALJ  
15 Battise, the statements do provide some testimony that could be construed as supporting plaintiff’s  
16 ability to function in a work environment. (*See* AR 23.) However, plaintiff’s brother also attested  
17 to plaintiff’s depression and frustration, his tendency to drop and break dishes due to his physical  
18 problems, his tendency to get tired easily and difficulty walking because of his limp, his  
19 nightmares, and his sensitivity to noise and how people talk to him. (AR 359-63.) Plaintiff’s  
20 mother likewise attested to his frustration and depression, slow and difficult movements, sensitivity  
21 to how people talk to him, and further stated: “Robert cannot do things, and it bothers him but he  
22 don’t complain much. He’s had nightmares about being beat with hammers and being stabbed,  
23  
24

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25 <sup>5</sup> Plaintiff also points to statements from his social worker and counselor, but the citations  
26 to the record provided do not support the contention that these individuals provided lay witness  
testimony that should have been reevaluated on remand. (*See* AR 80-85, 436.)

01 walks with a limp when upset. He is handicapped because of head injury.” (AR 364-68.) Given  
02 these statements, the Court cannot conclude that no reasonable ALJ, fully crediting the testimony,  
03 could have reached a different determination.

04  
05 Past Relevant Work

06 Plaintiff argues that the ALJ erred in finding he had past relevant work at step four. He  
07 further asserts error in the ALJ’s reliance on the VE’s testimony with respect to his past relevant  
08 work.

09 In considering plaintiff’s capacity to perform past relevant work, the ALJ found as follows:

10 The claimant was born on January 8, 1954 and he has GED education. [stet] He has  
11 reported a long history of temporary work, with a hotel/motel custodian job for 3  
12 months from 1999-2000, working for some type of hotel or resort. The issue of his  
13 past work was somewhat sketchy, but the prior decision concluded he had no past  
relevant work because he was not employed at substantial levels.

14 The claimant worked at the janitorial job from November 1999 to February 2000,  
15 during which he earned slightly over \$1,000 per month on average. That is at  
substantial gainful levels for that brief period of time, although the work was not  
16 sustained for more than three months. He stated that he left this job because he did  
not feel that he was treated fairly and he did not like his boss.

17 The vocational expert, Paul Tomita, M.Ed., testified that the claimant’s janitorial  
18 work, as he described it, was medium work at the SVP 4 or 3 levels (DOT 891.684-  
19 018 or DOT 382.664-010), and that three months was sufficient to learn the job. The  
claimant performed this job long enough to be considered past relevant work, and it  
20 was performed at substantial gainful levels while he was on the job.

21 In response to a hypothetical question which assumed an individual of the claimant’s  
22 age, education and past relevant work, who retained the residual functional capacity  
described above, Mr. Tomita testified that such a person would not be able to perform  
23 the claimant’s past relevant work because of his difficulty interacting with people.

24 Dr. Tomita’s testimony is noted, but he was focused on the claimant’s past employer,  
25 a hotel needing swimming pool maintenance and other tasks where interaction with  
the public would be commonplace. In comparing the claimant’s residual functional  
26 capacity with the physical and mental demands of his past work as a janitor, however,

01 the undersigned finds that the claimant is able to perform it as it is generally  
02 performed.

03 Mr. Tomita indicated as much, stating that “another” job mentioned by the claimant  
04 was janitor (DOT 381[.]687-018), a medium or light occupation. Mr. Tomita stated  
05 that the majority of janitorial jobs were actually light work. Thus, even if the claimant  
06 had slightly greater limitations than determined in this matter, he would be able to  
07 perform his past work.

08 (AR 768-69 (internal citations to record omitted.))

09 A. Past Relevant Work

10 Past relevant work is work (1) performed within the past fifteen years, (2) constituting  
11 substantial gainful activity (SGA), and (3) lasting long enough for the individual to have learned  
12 how to perform the work. 20 C.F.R. §§ 416.960(b)(1), 416.965(a). The Commissioner considers  
13 average earnings in determining whether a claimant has or has not engaged in SGA. *See* 20  
14 C.F.R. § 416.974(b).

15 Plaintiff asserts that the ALJ’s step four finding cannot be reconciled with his finding at  
16 step one. At step one, the ALJ found plaintiff had “not engaged in [SGA] at any time relevant to  
17 [the] decision.” (*See* AR 762 (emphasis and internal citation removed.)) He specifically noted that  
18 plaintiff’s income from 1999 and 2000 “was at less than substantial levels[.]” (*Id.*) Yet, he also  
19 stated: “However, this work activity is discussed in greater detail below.” (*Id.*) Plaintiff also  
20 asserts that the ALJ’s step four finding conflicts with the 2003 remand order from the Appeals  
21 Council, which found that “[t]he current record indicates no job as [past relevant work] as defined  
22 in Social Security Rulings (SSR) 82-61, 82-62[.]” (AR 281) (also stating: “For the relevant 15  
23 year period, the claimant’s earnings record shows minimal earnings in 1997, 1999 and 2000 of  
24 from \$1563 to \$1731 and even less in other years[.]”))

25 The Commissioner acknowledges the inconsistency in the ALJ’s findings, but maintains  
26

01 that plaintiff's 1999 to 2000 earnings while a janitor would have exceeded SGA levels. (*See* AR  
02 316 (plaintiff earned \$1563.55 in 1999 and \$1652.94 in 2000.)) He argues that the inconsistency  
03 in the ALJ's decision should be considered harmless error. *Cf. Batson v. Commissioner of the*  
04 *Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (finding any error in credibility analysis  
05 harmless in that it did not negate the validity of the ultimate conclusion reached). The  
06 Commissioner also points to the ALJ's reliance on the fact that plaintiff only left this janitorial  
07 position based on his perception that he was not treated fairly by his boss, as well as the fact that  
08 the VE testified that many janitorial positions were performed at only light exertional levels. (*See*  
09 AR 768-69.)  
10

11  
12 In response, plaintiff asserts that the ALJ's reliance on the reason he left the janitorial  
13 position overlooks the fact that his disability arises in part from his mental impairments, which  
14 result in limitations in tolerating other people, particularly supervisors. (*See, e.g.,* AR 390, 560,  
15 890.) Plaintiff also rejects the ALJ's reliance on the VE testimony, which, as discussed below,  
16 constitutes his second challenge to the ALJ's step four finding.  
17

18 Although, technically, the ALJ may be correct that plaintiff's 1999 and 2000 earnings  
19 reached substantial levels during that three month period, it is difficult to reconcile this conclusion  
20 with the ALJ's step one finding, the statement in the Appeals Council's 2003 remand order, and  
21 the 2004 findings of ALJ Battise (*see* AR 18 and 24 (finding no SGA at step one and no  
22 substantial earnings/past relevant work at step four)). The ALJ's reliance on why plaintiff left this  
23 position does not remedy the issue and the VE's testimony is addressed below. Also, it should  
24 be noted that, if an individual worked only off-and-on for brief periods during the relevant  
25 fifteen-year period, that work will generally not be considered past relevant work. 20 C.F.R. §  
26

01 416.965. For these reasons, on remand, the ALJ should further explain the discrepancy between  
02 his step one and step four findings as to SGA.

03 B. Vocational Expert's Testimony

04 Plaintiff first argues that the hypothetical posed by the ALJ failed to include all of his  
05 exertional and nonexertional limitations. He does not elaborate, instead pointing to arguments  
06 made with respect to the opinions of various physicians.

07  
08 A hypothetical posed to a VE must include all of the claimant's functional limitations  
09 supported by the record. *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49 F.3d 562, 520-71  
10 (9th Cir. 1995)). A VE's testimony based on an incomplete hypothetical lacks evidentiary value  
11 to support a finding that a claimant can perform jobs in the national economy. *Matthews v.*  
12 *Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (citing *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th  
13 Cir. 1991)). In this case, the above-described inconsistency with respect to plaintiff's shoulder  
14 limitations needs to be clarified and appropriately addressed at steps four and/or five.

15  
16 Plaintiff next asserts that the VE actually testified that a person with his limitations could  
17 not work as a janitor. That is, the VE testified that plaintiff could not perform his past relevant  
18 work with the inclusion of a limitation on contact with the public and close interaction with  
19 coworkers, a limitation the ALJ included in his hypothetical and RFC finding. (*See* AR 749-50,  
20 763.) Plaintiff avers that the ALJ erred in finding that the VE focused only a limitation on  
21 interacting with the public. (*See* AR 769.) Plaintiff further points out that, as noted above, with  
22 the inclusion of a limitation to "occasional" reaching, instead of the "frequent" reaching in the  
23 ALJ's hypothetical, the VE testified that plaintiff could not perform the work of a janitor or  
24  
25  
26

01 custodian. (AR 749, 752-53.)<sup>6</sup>

02 As reflected above, the Commissioner notes the VE's testimony that many janitorial  
03 positions are performed at only light exertional levels. (*See* AR 750, 769.) He further avers that  
04 the ALJ reasonably assumed plaintiff could perform this work, whether characterized as past  
05 relevant work at step four or as an adjustment to other jobs at step five. He suggests that, at most,  
06 any error should result in a remand for completion of the sequential evaluation process at step five.  
07

08  
09 The VE testified regarding two separate janitorial-type positions. First, with respect to the  
10 custodial work plaintiff performed at a hotel for three months in 1999 and 2000, the VE found two  
11 job titles covered the work performed: (1) "swimming-pool servicer," DOT 891.684-018; and (2)  
12 "janitor" (alternatively, "maintenance engineer"; "superintendent, building"), DOT 382.664-010.  
13 (AR 748-49.) As argued by plaintiff, and reflected in the ALJ's decision, the VE found plaintiff  
14 would not be able to perform this work based on his difficulty in interacting with people. (AR  
15 749-50, 769.) Second, when asked whether there were other jobs in the national economy plaintiff  
16 could perform with the limitations as assessed in the RFC (including limitations on contact with  
17 others), the VE pointed to another janitorial position, DOT number 381.687-018. (AR 750.) It  
18 is not clear, but the VE seems to say that plaintiff mentioned this job previously, stating in full:  
19 "— and he had mentioned it before, janitor. . . ." (*Id.*) As distinguished from the first janitorial  
20 position considered, this position is titled "cleaner, industrial," with "janitor" as one of several  
21  
22  
23

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24 <sup>6</sup> Plaintiff also points to a "Vocational Decision Worksheet" and asserts that this supports  
25 the conclusion that the Commissioner at one point found him incapable of performing any past  
26 relevant work. (AR 369.) He fails to provide any support for the contention that this 2003  
administrative document could bind the ALJ in future decisions. Also, it should be noted that  
the document indicates plaintiff is capable of performing other work. (*See id.*)



